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IN THE

# Supreme Court of the United States

HENRY MONTGOMERY,

*Petitioner,*

v.

LOUISIANA,

*Respondent.*

**On Writ Of Certiorari**
**To The Supreme Court Of Louisiana**

## BRIEF OF *AMICUS CURIAE* PROFESSOR DOUGLAS A. BERMAN IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*[1]

Douglas A. Berman is a criminal law professor at The Ohio State University Moritz College of Law. His teaching and research focuses on criminal sentencing. He has published over twenty articles regarding criminal sentencing, and he is the coauthor of *Sentencing Law and Policy: Cases, Statutes and Guidelines* (Aspen 1st, 2d & 3d eds.). His criminal sentencing blog—*Sentencing Law & Policy* (http://sentencing.typepad.com/)—has been cited in forty-eight judicial opinions. *See, e.g., United States v. Booker*, 543 U.S. 220, 277 n.4(2005) (Stevens, J., dissenting).

Professor Berman believes that applying Eighth Amendment noncapital sentencing rules retroactively on collateral review furthers the traditional purposes of criminal sentencing and retroactivity jurisprudence. Accordingly, he files this brief in support of the petitioner.

## SUMMARY OF THE ARGUMENT

In the criminal justice realm, the desire to achieve finality in criminal proceedings has long been balanced against the overarching goals of accuracy and efficacy. For example, when an imprisoned person is discovered to be indisputably innocent, finality interests are overwhelmed by the injustice of an inaccurate conviction and the

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[1] All parties have consented to the filing of this brief. As required by Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus*, its members, and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

unfairness of continuing to punish the innocent person. Indeed, when DNA evidence conclusively proves a defendant was wrongfully convicted, prosecutors are typically quick to seek to vacate the inaccurate conviction and to advocate for the release of the wrongly convicted prisoner. *See, e.g.*, Mandy Locke, *After 36 Years, Joseph Sledge's Unfamiliar Feeling: Normal*, Charlotte News & Observer, Jan. 23, 2015 (discussing cases in which, after investigations by the North Carolina Innocence Inquiry Commission, a local district attorney and a panel of judges agreed that a wrongful conviction should be overturned). Judges and executive officials frequently play a critical role in remedying prior miscarriages of justice, no matter how long ago the conviction was secured.

To the same end, the Court's habeas corpus jurisprudence has long provided that all new substantive and watershed procedural rules apply retroactively on both direct and collateral review. That is so because finality concerns do not justify preserving even long-ago criminal judgments that are inaccurate due to substantive flaws or that were the product of fundamentally inadequate procedures.

The paramount concern for accuracy and efficacy in criminal proceedings requires that the Eighth Amendment rule adopted in *Miller v. Alabama* be applied retroactively. The *Miller* Rule, which safeguards the "traditional exercise of discretion by a sentencing court," *Koon v. United States*, 518 U.S. 81, 98 (1996), ensures that juvenile offenders receive more accurate and efficacious sentences. As the Court has long recognized, and as it reaffirmed in *Miller*, juveniles define a unique class of offenders.

Due to their immaturity and vulnerability to negative influences, juveniles must have their unique attributes considered by a sentencing authority, to avoid the risk of an unconstitutionally severe punishment. The Court's Eighth Amendment jurisprudence has also long recognized that mandatory sentencing schemes, because they limit a sentencer's ability to consider many relevant factors, can create an intolerable risk of unconstitutionally inaccurate and unreliable sentencing outcomes.

Moreover, the passage of time usually does not diminish the accuracy and efficacy of the sentencing process. Rather, in many cases it reveals new evidence about both the consequences of a crime and the true character of an offender. This additional information allows a sentencer to select a more accurate and efficacious sentence. New information is particularly informative in the juvenile sentencing setting due both to a juvenile's capacity for change and his susceptibility to outside influences at the time of the initial sentencing.

These concerns trump those for finality in sentencing. A prompt but excessive sentence does not necessarily further the effectiveness of criminal laws. Even if prompt, an excessive sentence does not enhance the deterrent effect of criminal laws or increase the chance a defendant will be rehabilitated. States, moreover, have no valid interests in punishing or incapacitating someone longer than is constitutionally permitted. That is especially true for juveniles, who are less likely to be deterred, less deserving of punishment, and less likely to obtain leniency from prosecutors. Accordingly, the Court should hold that the *Miller*

Rule applies retroactively on collateral review regardless whether the rule satisfies *Teague*'s test for retroactivity.

Should the Court decide to apply *Teague* in this distinct sentencing setting, the *Miller* Rule is a substantive rule that applies retroactively on collateral review. *See Teague v. Lane*, 489 U.S. 288, 311-13 (1989). It is a "rule[] prohibiting a certain category of punishment for a class of defendants because of their status," *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Because a punishment is defined by both its floor and its ceiling, *see Alleyne v. United States*, 133 S. Ct. 2151, 2160 (2013), *mandatory* life without parole is a distinct category of punishment. After all, it is the *only* punishment with both a floor and ceiling of life without parole. Treating mandatory life without parole as a category of punishment distinct from a punishment allowing, but not requiring, life without parole comports with the differing penological purposes for mandatory sentencing, which emphasizes deterrence and incapacitation, and discretionary sentencing, which emphasizes rehabilitation.

## ARGUMENT

### I. BECAUSE IT IMPROVES SENTENCING ACCURACY AND EFFICACY, THE *MILLER* RULE SHOULD APPLY RETROACTIVELY.

A. When federal habeas corpus review first expanded to reach otherwise unreviewable state decisions involving fundamental rights, Members of the Court and scholars worried about the practical effects of broadened habeas review. A chief concern were the difficulties that could arise from allowing any state prisoner to collaterally attack in federal

court any aspect of his state criminal conviction. *See generally Fay v. Noia*, 372 U.S. 391, 446-48 (1963) (Clark, J., dissenting); *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976); *Teague*, 489 U.S. 288; Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 Harv. L. Rev. 441, 444-53 (1963); Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 Harv. L. Rev. 56, 79-80 (1965); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 146-51 (1970). At the same time, observers recognized that finality concerns are linked to—and, in a sense, always subservient to—concerns about criminal justice accuracy and efficacy. *See, e.g.*, *Teague*, 489 U.S. at 311-13 (stressing importance of procedures critical to "accurate determination of innocence or guilt" in defining reach of habeas review); *Stone*, 428 U.S. at 491-92, n.31 (suggesting habeas review is most needed to "safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty"); Bator, *supra*, at 453-60 (stressing need for collateral review when there was a "failure of process" making a prior determination unreliable).

Accordingly, the Court's habeas jurisprudence has always balanced finality interests against overarching concerns for criminal justice accuracy and efficacy. In *Stone v. Powell*, for example, the Court removed Fourth Amendment claims from the scope of federal habeas review principally because such claims are not central to the accuracy of verdicts reached at state criminal trials. Likewise, in articulating retroactivity rules to be applied by federal habeas courts when reviewing state criminal judgments, *Teague* stressed "the relevance of the

likely accuracy of convictions in determining the available scope of habeas review." 489 U.S. at 313. The concern for accuracy and efficacy is reflected most directly in *Teague*'s recognition that new substantive rules are applied retroactively to *all* final cases, no matter how dated. *See id.* at 311. Finality interests, *Teague* explains, are not sufficient to prevent collateral review of a criminal judgment that is inaccurate due to a substantive flaw. *See id.*

Accuracy concerns also are reflected in the *Teague* exception for "watershed" procedural rules that "undermine the fundamental fairness that must underlie a conviction or seriously diminish the likelihood of obtaining an accurate conviction." *Id.* at 315. A state criminal judgment achieved in a manner that was fundamentally unfair or through a process that seriously diminished its likely accuracy is subject to habeas review because it is likely not a reliable or efficacious criminal judgment.

B. The Court has had no prior occasion to apply *Teague* retroactivity principles to Eighth Amendment noncapital sentencing rules.[2] The lower courts, however, have struggled in applying the Court's traditional retroactivity jurisprudence to the *Miller* Rule. *Compare, e.g., In re Morgan*, 713 F.3d 1365, 1367-68 (11th Cir. 2013) (holding petitioner failed to make prima facie showing that the *Miller* Rule was retroactive), *with In re Pendleton*, 732 F.3d

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[2] *Caspari v. Bohlen* is the only case in which the Court has applied *Teague* to a noncapital sentencing rule. 510 U.S. 383 (1994). The Court assumed, without deciding, that *Teague* applied to a Fifth Amendment rule concerning noncapital sentencing. *Id.* at 390-97.

280, 282-83 (3d Cir. 2013) (per curiam) (holding petitioner made such a showing). Those struggles in part reflect the fact that *Teague* retroactivity principles typically have been applied to rules respecting convictions and capital sentences rather than rules respecting noncapital sentences.

C. The States' interest in preserving the finality of convictions and capital punishments is less prevalent in the noncapital sentencing setting. This is especially true with respect to a mandatory sentence, which results from a process that precludes sentencing judges from considering the complete circumstances of the crime and the full character of the offender. *See generally Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

1. While the passage of time may negatively impact the accuracy and efficacy of trials, the same is not true for sentencing proceedings. Rather, sentencing determinations have long centered on a discretionary decision-making process concluded on the day of sentencing, whenever that day occurs, taking into account all relevant circumstances of the defendant on that day. Thus, "'[a] court's duty is always to sentence the defendant as he stands before the court on the day of sentencing.'" *Pepper v. United States*, 562 U.S. 476, 492 (2011) (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)); *see also Bullington v. Missouri*, 451 U.S. 430,

451 (1981) (Powell, J., dissenting) (noting that in resentencing "'the second jury's sentencing decision is as "correct" as the first jury's'" (quoting *Green v. United States*, 355 U.S. 184, 224 (1957)). The sentencer must "consider every convicted person as an individual and every case as a unique study in the human failings that sometimes mitigate, sometimes magnify, the crime and the punishment to ensue." *Koon*, 518 U.S. at 113. Thus, the sentencer, who "is not confined to the narrow issue of guilt," traditionally looks beyond the facts of the offense to garner "the fullest information possible concerning the defendant's life and characteristics" to "guide . in the intelligent imposition of sentences." *Williams v. New York*, 337 U.S. 241, 246-47 (1949).

In view of these considerations unique to the sentencing phase of a criminal proceeding, the passage of time can actually *improve* the accuracy and efficacy of sentencing outcomes. At resentencing, a sentencer can take into account information that was not available at the previous sentencing. *See Pepper*, 562 U.S. at 491-92 (noting "evidence of [petitioner's] rehabilitation since his initial sentencing is clearly relevant to the selection of an appropriate sentence" and "provides the most up-to-date picture of [his] 'history and characteristics'"). As a result, a resentencing court can efficiently update the sentence, taking into account not only what was known at the original sentencing, but also any new relevant evidence about the consequences of the crime and about the true character of the offender. *See, e.g.*, *Pepper*, 562 U.S. at 491-93; *Jones v. State*, 414 Md. 686, 695 (2010) (noting that resentencing should be conducted "as if the sentence was occurring for the first time"); *State v. Allen*, 446

So. 2d 1200, 1202 (La. 1984) (noting the need to consider post-offense conduct in resentencing).

Sentencing proceedings, moreover, are not governed by strict trial rules. Rather, sentencers benefit from the wealth of information available from "out-of-court sources to guide their judgment toward a more enlightened and just sentence." *Williams*, 337 U.S. at 251; *see also United States v. DiFrancesco*, 449 U.S. 117, 136-37 (1980) (noting a sentencer can consider the original presentence report and other pertinent information for the original sentencing hearing); Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. Rev. 79, 152 (2012) (same); Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. Rev. 1771 (2003) (detailing the many constitutional and statutory rights generally afforded at trial but not at sentencing).

Contrast a resentencing to a criminal retrial. A trial aims to determine the truth of allegations about historical events that occurred in the past. Because a retrial takes place well after the first trial, fading memories, unavailable witnesses, and other lost evidence can prejudice the State's case and lead to wrongful acquittals. *See Mackey v. United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in part and dissenting in part). *Pepper*, 562 U.S. at 491-93; Russell, *supra* at 152. Those interests in preserving the accuracy of the initial trial, however, do not extend to the original sentencing.

2. The cost of a noncapital resentencing hearing is less than that of a new trial. *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) ("[T]he cost of correcting a sentencing error is far less than

the cost of a retrial."); *see also United States v. Saro*, 24 F.3d 283, 288 (D.C. Cir. 1994) ("[A] resentencing is nowhere near as costly or as chancy an event as a trial."); Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 Utah L. Rev. 561, 599 (2013) (estimating resentencing proceedings on average costs only $1,222). "A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel." *Williams*, 399 F.3d at 456. The sentencer typically relies on the existing record and brief arguments from the parties. *Id.* The court may order a new presentencing report, but the additional investigation required is generally no more than a review of prison records. *See* Russell, *supra* at 149. A retrial, on the other hand, gains few efficiencies from the costs expended in the original trial—it is essentially a repeat, demanding the time and resources of judges, juries, prosecutors, and corrections officials. *See United States v. Douglas*, 874 F.2d 1145, 1150 (7th Cir. 1989) *abrogated on other grounds by United States v. Durrive*, 902 F.2d 1221 (7th Cir. 1990) (noting the many "duplicative efforts" of retrial).

3. Ordering resentencing on collateral review does not interfere with a State's penological interests. As an initial matter, collateral review of a sentence does not allow a defendant to escape punishment altogether, as does collateral review of a conviction. Instead, a defendant merely seeks an appropriate sentence based on the offense and the defendant's particular circumstances. Nor does resentencing interfere with a State's interest in deterrence. Unlike capital sentencing, where the State's chosen

punishment is delayed by habeas proceedings, thereby potentially impacting the sentence's deterrent effect, the defendant who merely seeks resentencing does not delay punishment. Rather, the defendant continues to serve a term of years sentence during collateral review. *See Lane v. Williams*, 455 U.S. 624, 631 (1982) (dismissing as moot habeas petitions attacking only sentences when "those sentences expired during the course of these proceedings"). Indeed, by ensuring a sentence is appropriately calibrated to the crime and the defendant, resentencing in fact maximizes deterrence. *Engle v. Isaac*, 456 U.S. 107, 127 n.32 (1982) ("Deterrence depends upon the expectation that 'one violating the law will swiftly and certainly become subject to punishment, just punishment.'") (quoting Bator, *supra*, at 452).

Nor does resentencing undermine rehabilitation. A defendant is not released until he has served out his new sentence, which will take into account a State's rehabilitation interests. *See Pepper*, 562 U.S. at 491-93. In contrast, requiring a defendant to serve a sentence *longer* than necessary for rehabilitation would seemingly undermine the goals of rehabilitation. Thomas Orsagh & Jong-Rong Chen, *The Effect of Time Served on Recidivism: An Interdisciplinary Theory*, 4 J. Quantitative Criminology 155, 162 (1988) (finding many prisoners become more likely to recidivate when their sentences exceed a certain point); *accord Graham v. Florida*, 560 U.S. 48, 74 (2010) ("'[L]ife imprisonment without parole forswears altogether the rehabilitative ideal."); *see also Miller v. Alabama*, 132 S. Ct. 2455, 2468 (2012) (same).

The same is true for the State's interests in retribution and incapacitation. Those interests are not furthered by requiring a defendant to serve an inappropriately long sentence. *See Barber v. Thomas*, 560 U.S. 474, 504 (2010) (Kennedy, J., dissenting) ("To a prisoner, time behind bars is not some theoretical or mathematical concept. It is something real, even terrifying. Survival itself may be at stake.").

4. Even where finality of sentences furthers the State's penological interests, the finality of *juvenile* sentences would do far less to serve those interests. As the Court has recognized, criminal laws are less likely to deter juveniles from committing crimes. "'[T]he same characteristics that render juveniles less culpable than adults'—their immaturity, recklessness, and impetuosity—make them less likely to consider potential punishment." *Miller*, 132 S. Ct. at 2465 (quoting *Graham*, 560 U.S. at 72). Thus, affording great weight to the finality of juvenile sentences in many ways undermines the goal of deterrence.

Moreover, juveniles have "'lessened culpability' and greater 'capacity for change.'" *Miller*, 132 S. Ct. at 2460 (quoting *Graham*, 560 U.S. at 50, 74). A juvenile's "lessened culpability" limits the State's interests in exacting retribution. A juvenile's "greater capacity for change" means an excessive sentence likely will undermine a State's rehabilitation goals more so than in the adult sentencing context.

The same characteristics of youth—lessened culpability and greater capacity for change—that reduce a State's interests in juvenile sentencing

finality support a broader retroactivity rule for discretionary juvenile sentencing rules. New discretionary rules allow the sentencer to take these characteristics into account and ensure a juvenile does not receive an excessively harsh sentence, which reduces the opportunity for rehabilitation (and, in the case of life without parole, eliminates it altogether).

Given children's lessened culpability, it is deeply unfair to require them to serve excessive sentences. And given their greater capacity for change, it is equally unfair to deny children a meaningful opportunity for rehabilitation (or eliminate it altogether). Simply put, the consequences of an improper life without parole sentence are "especially harsh for a juvenile." *Graham*, 560 U.S. at 70. After all, a juvenile "will on average serve more years and a greater percentage of his life in prison than an adult offender." *Id.*

D. Because the *Miller* Rule ensures that juvenile offenders receive more accurate and efficacious sentences, the Rule should be applied retroactively to all prior cases regardless whether the Rule is ultimately considered substantive or procedural, watershed or not. As detailed *infra*, the *Miller* Rule should apply retroactively under traditional *Teague* analysis. But in light of the distinctly lessened finality interests applicable to noncapital sentencing proceedings and outcomes, the Court should hold simply that the *Miller* Rule applies retroactively because it improves sentencing accuracy and efficacy without unduly impinging on the States' finality interests.

## II. *MILLER* IS A SUBSTANTIVE RULE THAT APPLIES RETROACTIVELY UNDER *TEAGUE*.

A. New rules of criminal procedure that prohibit a certain category of punishment are "substantive rules" that apply retroactively on collateral review. *See Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). In *Teague*, a plurality of the Court held that new rules placing "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" apply retroactivity on collateral review. *Teague*, 489 U.S. at 311 (quoting *Mackey*, 401 U.S. at 692 (Harlan, J., concurring in judgments in part and dissenting in part)). Shortly thereafter, the Court explained the substantive exception extends to "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330. "Such rules apply retroactively because they necessarily carry a significant risk that a defendant faces a punishment that the law cannot impose upon him." *Summerlin*, 542 U.S. at 352 (citations and internal quotation marks omitted) (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).

To date, the Court has held two rules fall within *Teague*'s substantive exception: a rule prohibiting intellectually disabled persons from being sentenced to death, *Penry*, 492 U.S. at 330, and a rule altering the elements of a statutory crime, *Bousley v. United States*, 523 U.S. 614, 619-20 (1998). Significant here is *Penry*, which addressed the punishment category of substantive rules. There, the petitioner argued that the Eighth Amendment prevents the

government from executing an intellectually disabled person. 492 U.S. at 328. Because *Penry* was before the Court on collateral review, the Court addressed "the retroactivity issue" of such a rule as a threshold matter. *Id.* at 329. The Court held that the proposed rule would "fall under the first exception to the general rule of nonretroactivity" because it would prohibit a certain category of punishment (the death penalty) for a class of defendants because of their status (intellectually disabled). *Id.* at 330. While the Court ultimately declined to adopt the rule in *Penry*, *id.* at 340, it later recognized the rule in *Atkins v. Virginia*, 536 U.S. 304 (2002). *Cf. Tyler v. Cain*, 533 U.S. 656, 666 (2001) ("[T]his Court can make a rule retroactive over the course of two cases.").

B. A "category of punishment," *Penry*, 492 U.S. at 330, is defined by both its floor and its ceiling. *See Alleyne*, 133 S. Ct. at 2160. In *Alleyne*, the Court held that the Sixth Amendment requires a State to prove to a jury beyond a reasonable doubt any fact increasing the minimum punishment for a crime. 133 S. Ct. at 2155. Because "[m]andatory minimum sentences increase the penalty for a crime," the Court explained, "any fact that increases the mandatory minimum must be submitted to the jury." *Id.* In reaching this conclusion, the Court found it immaterial that a lower floor would not have prevented Alleyne from receiving the same sentence. *Id.* at 2162 ("It is no answer to say that the defendant could have received the same sentence with or without that fact."). That was so because the "legally prescribed range *is* the penalty affixed to the crime [and] increasing either end of the range produces a *new penalty*." *Id.* at 2160 (second emphasis added).

Similarly, in *Lindsey v. Washington*, the Court held that the *ex post facto* clause prohibits a state from sentencing a defendant under a subsequently adopted statute increasing the minimum sentence. 301 U.S. 397, 399 (1937). Washington adopted a new statute months after the defendant committed larceny, "[t]he effect of [which was] to make mandatory what was before only the maximum sentence." *Id.* at 400. The fact that the 15-year sentence imposed was permissible under the prior statute was immaterial:

> [T]he *ex post facto* clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed. The Constitution forbids the application of any new punitive measure to a crime already consummated regardless of the length of the sentence imposed, since the measure of punishment prescribed by the later statute is more severe than that of the earlier."

*Id.*; *see also California Dep't of Corr. v. Morales*, 514 U.S. 499, 505-06 & n.3 (1995) (clarifying *Lindsey* Rule).

Penalties with different floors are different "categories of punishment"—even when they result in identical sentencing outcomes. Thus, a punishment is not defined by the sentencing outcome in a particular case, but by the authorized sentencing range applicable in all cases.

C. Mandatory life without parole is a distinct category of punishment from life with the

opportunity for parole. Life without parole is "qualitatively different" and "far more severe" than life with the opportunity for parole. *Solem v. Helm*, 463 U.S. 277, 297 (1983). *Solem* held that a life without parole sentence was grossly disproportionate when imposed under a recidivist statute for a seventh nonviolent offense. *Id.* at 303. *Solem* distinguished an earlier case holding that a life sentence imposed under a recidivist statute for a third nonviolent offenses did not violate the Eighth Amendment. *See Rummel v. Estelle*, 445 U.S. 263 (1980). The opportunity for parole in *Rummel*, and the corresponding lack of opportunity in *Solem*, was decisive. *Solem*, 463 U.S. at 297, 300-03.

Similarly, in striking down life *without* parole sentences for juvenile nonhomicide offenders in *Graham*, the Court expressly did not extend its holding to life sentences *with* the opportunity for parole. "The *Eighth Amendment* does not foreclose the possibility that persons convicted of nonhomicide crimes committed before adulthood will remain behind bars for life. It does forbid States from making the judgment at the outset that those offenders never will be fit to reenter society." *Graham*, 560 U.S. at 75. That is so because life without parole is qualitatively different than all other sentences. "The State does not execute the offender sentenced to life without parole, but the sentence alters the offender's life by a forfeiture that is irrevocable. It deprives the convict of the most basic liberties *without giving hope of restoration*." *Id.* at 69-70 (emphasis added).

D. The *Miller* Rule is substantive because it forecloses mandatory life without parole for

juveniles. As *Miller* recognized, the Constitution requires that a sentencer have the option of sentencing a juvenile homicide offender to something less than life without parole. 132 S. Ct. at 2469. While *Miller* did not decide what lower sentencing options must be available, the lower sentence can be no more severe than life with the opportunity for parole. *See id.*

Because *Miller* requires at a minimum that the low end of the sentence range be life with the opportunity for parole, it prohibits a distinct category of punishment—mandatory life without parole. Indeed, "[t]he premise of the [*Miller* Rule] is that mandatory sentences are categorically different from discretionary ones." *Miller*, 132 S. Ct. at 2479 n.2 (Roberts, C.J., dissenting). The *Miller* Rule is therefore substantive and applies retroactively on collateral review. *See Penry*, 492 U.S. at 330.

E. Treating mandatory life without parole as a distinct category of punishment comports with the differing penological purposes for mandatory and discretionary sentences. Mandatory sentencing schemes prioritize deterrence and incapacitation, whereas discretionary sentencing schemes prioritize rehabilitation and proportionality.

"[C]ompeting theories of mandatory and discretionary sentencing have been in varying degrees of ascendancy or decline since the beginning of the Republic." *Harmelin v. Michigan*, 501 U.S. 957, 999 (1991) (Kennedy, J., concurring in part and concurring in the judgment). Discretionary, "indeterminate sentencing and parole were based on concepts of the offender's possible, indeed probable, rehabilitation." *Mistretta v. United States*, 488 U.S.

361, 363 (1989); *see also United States v. Grayson*, 438 U.S. 41, 46 (1978). By adjusting a defendant's release to his rehabilitation, discretionary sentencing and parole seek to ensure "that the punishment should fit the offender and not merely the crime." *Williams*, 337 U.S. at 247.

Rationales for mandatory sentencing laws, by comparison, are principally utilitarian:

> Long prison sentences for recidivists, drug traffickers, and those who commit violent crimes isolate them from the general community and thereby prevent them from committing further crimes outside prison walls. Mandatory sentencing provisions are also designed to deter, sending the message to potential offenders that harsh consequences follow from their criminal conduct.

Gary T. Lowenthal, *Mandatory Sentencing Laws: Undermining the Effectiveness of Determinate Sentencing Reform*, 81 Cal. L. Rev. 61, 67 (1993). While not all mandatory prison sentences are flatly at odds with rehabilitation, "life imprisonment without parole forswears altogether the rehabilitative ideal." *Graham*, 560 U.S. at 74. And in the juvenile sentencing context, "this mandatory punishment disregards the possibility of rehabilitation even when the circumstances most suggest it." *Miller*, 132 S. Ct. at 2468.

These competing theories of punishment further confirm why mandatory life without parole should be treated as a distinct category of punishment for

retroactivity purposes. It is unlike any discretionary sentencing regime, and is largely untethered to notions of rehabilitation and proportionality.

## CONCLUSION

The Court should reverse the Louisiana Supreme Court's judgment below.

Respectfully submitted,

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